

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

BEVERLY J. LYNCH
Claimant

VS.

**FOUR B CORPORATION d/b/a
HEN HOUSE SUPERMARKET**
Respondent
Self-Insured

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Docket No. 199,852

ORDER

Claimant requested Appeals Board review of the Award entered by Administrative Law Judge Robert H. Foerschler dated March 14, 1996 and the Order Nunc Pro Tunc entered by the Administrative Law Judge on March 25, 1996. The Appeals Board heard oral argument in Kansas City, Kansas on July 16, 1996.

APPEARANCES

Claimant appeared by her attorney, Michael R. Wallace of Shawnee Mission, Kansas. Respondent, a qualified self-insured, appeared by its attorney, H. Wayne Powers of Overland Park, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and adopted the stipulations listed in the March 14, 1996 Award. The parties, at oral argument before the Appeals Board, stipulated that the proper amount of unauthorized medical expenses as provided by K.S.A. 44-510(c)(2) should be \$500 instead of the \$350 ordered by the Administrative Law Judge in the Award.

ISSUES

Claimant raised the following issues for Appeals Board review:

- (1) Whether the Administrative Law Judge erred in admitting as part of the record in this case an addendum dated January 14, 1996 to Steven L. Hendler, M.D.'s independent medical report dated August 21, 1995.
- (2) Nature and extent of claimant's disability.
- (3) Whether the Administrative Law Judge erred in not ordering future medical treatment upon application to the Director.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record, considering the briefs, and hearing arguments of the parties, the Appeals Board finds as follows:

- (1) The parties were unable to agree upon claimant's permanent functional impairment that resulted from her work-related injuries. Accordingly, pursuant to K.S.A. 44-510e(a), the Administrative Law Judge appointed Steven L. Hendler, M.D., to perform an independent medical evaluation of claimant and to express an opinion as to claimant's permanent functional impairment. Dr. Hendler performed such an examination and evaluation of the claimant on August 21, 1995. Dr. Hendler subsequently issued a report to Administrative Law Judge Foerschler opining claimant had suffered a 31 percent whole body permanent functional impairment as a result of her injuries. Respondent's counsel, in violation of the Administrative Law Judge's Order, had an ex parte meeting with Dr. Hendler and questioned whether Dr. Hendler's component functional impairment percentages that he used to calculate the whole body functional impairment rating were calculated correctly. Prior to the meeting, Dr. Hendler was concerned about the ex parte meeting and telephoned the Administrative Law Judge. The Administrative Law Judge at that time gave Dr. Hendler permission to meet with respondent's counsel in reference to the possible calculation error. Dr. Hendler, as a result of that meeting, filed an addendum to his original report which corrected the calculation in his original report from a 31 percent whole body rating to a 20 percent whole body rating. Additionally, the addendum contained a separate right upper extremity rating of 34 percent. Claimant vigorously objected to the addendum. He requested the Administrative Law Judge to rule that the addendum was inadmissible as evidence in this case because the addendum was obtained by an ex parte meeting with respondent's counsel in contravention of the Administrative Law Judge's Order. Respondent's attorney apologized for making the ex parte contact and offered to pay the cost for claimant to take Dr. Hendler's deposition in order to clarify the error in his calculation. Claimant declined this offer.

Claimant's main argument against Dr. Hendler's addendum was the original report included a functional impairment rating to claimant's left upper extremity that was incorporated in the 31 percent whole body rating. The Appeals Board has reviewed both Dr. Hendler's original report and the subsequent addendum. The Appeals Board finds Dr. Hendler corrected a calculation error that was contained in his original report which

reduced claimant's whole body rating from 31 percent to 20 percent. The Appeals Board further concludes Dr. Hendler's whole body rating contained in his original report and the whole body rating subsequently contained in the addendum was not composed of functional impairment values assigned to claimant's left upper extremity. Dr. Hendler reported claimant suffered a loss of use of her right upper extremity only, as a result of her work-related injuries. Dr. Hendler reported that as a result of his examination of claimant, her left hand was doing very well and claimant reported no pain, numbness, or weakness in the left hand.

The Appeals Board is mindful that respondent's counsel was wrong when he arranged an ex parte meeting with the appointed independent medical examination doctor in violation of the Administrative Law Judge's Order. However, the Appeals Board finds that the claimant was not prejudiced by the meeting because Dr. Hendler's whole body impairment rating was never intended to be based on permanent functional impairment to both the right and left upper extremities. Dr. Hendler's whole body rating in both the original report and the addendum was converted from the permanent functional rating of only claimant's right upper extremity.

(2) The Administrative Law Judge found claimant had suffered permanent injury to only her right upper extremity and not a bilateral injury. Accordingly, the Administrative Law Judge limited claimant's permanent partial disability to the loss of use of the right forearm as required by K.S.A. 44-510d(a)(12). The Administrative Law Judge found claimant was entitled to a 32 percent permanent partial disability of the forearm based on an average of the functional impairment opinions of the physicians who expressed an opinion on functional impairment. The Appeals Board agrees with that finding and for the reasons stated below finds that 32 percent permanent partial loss of use of claimant's right forearm is the appropriate award.

Claimant argued she was entitled to a 22 percent whole body functional impairment award based on the opinion of Edward J. Prostic, M.D. Claimant's attorney requested Dr. Prostic, an orthopedic surgeon in Kansas City, Missouri, to examine claimant and render an opinion on claimant's functional impairment rating. Dr. Prostic opined that claimant had a 30 percent functional impairment to her right forearm and a 10 percent functional impairment to her left forearm which combined to a 22 percent whole body functional impairment in accordance with the AMA Guides, Third Edition, Revised. Dr. Prostic admitted his examination of claimant did not produce any positive physical findings which confirmed entrapment neuropathy on the left. Dr. Prostic testified he based his 10 percent functional impairment on the EMG test of June 16, 1994, which diagnosed early left carpal tunnel syndrome.

John Moore, IV, M.D., one of claimant's treating physicians, opined that claimant's permanent functional impairment of the right upper extremity at the wrist level amounted to 31 percent. Dr. Moore testified claimant never made any complaints to him in reference to left hand problems while he was treating her in February, March, and April 1995. Furthermore, Dr. Moore concluded that actual positive clinical findings consistent with carpal tunnel syndrome are necessary before a diagnosis of carpal tunnel syndrome can be made from a positive EMG. If claimant did not have positive clinical findings when examined by Dr. Prostic, Dr. Moore opined claimant may have had some mild pressure on the median nerve at the wrist but this would not be severe enough for a diagnosis of carpal

tunnel syndrome or to assign impairment. As stated above, Dr. Hendler's whole body functional impairment rating did not include claimant's left upper extremity. Dr. Hendler reported that the claimant had no left hand complaints when he examined her on August 21, 1995.

Therefore, the Appeals Board concludes that the greater weight of the evidence in the record established that claimant sustained a permanent injury to only her right upper extremity from her work-related injury. Accordingly, the Administrative Law Judge's finding that claimant sustained a 32 percent functional impairment of her right forearm is affirmed. This functional impairment rating is supported by Dr. Prosic's 30 percent, Dr. Moore's 31 percent, and Dr. Hendler's 34 percent permanent partial functional impairment ratings.

(3) With regard to future medical treatment, claimant testified her hands remain symptomatic more on the right than on the left. The overall medical evidence contained in the record established that the claimant's right carpal tunnel release surgery performed by Dr. Satterlee was of limited success. Based on this evidence, the Appeals Board finds an award of future medical upon application to the director is appropriate.

Furthermore, the Appeals Board finds that the findings of fact and conclusions of law as enumerated in the Administrative Law Judge's Award are accurate and appropriate. Such findings and conclusions are hereby adopted by the Appeals Board as its own to the extent they are not inconsistent with this Order.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Robert H. Foerschler dated March 14, 1996 should be, and is hereby affirmed as it relates to an award of 32 percent permanent partial general disability of claimant's right forearm and the award is modified as future medical treatment may be ordered upon proper application to the Director.

AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Beverly J. Lynch, and against respondent, Four B Corporation, d/b/a Hen House Supermarket, a self-insured, for an accidental injury sustained on October 6, 1994 and based upon an average weekly wage of \$296.05.

Claimant is entitled to 19.43 weeks of temporary total disability compensation at the rate of \$197.38 per week or \$3,835.09, followed by 57.78 weeks at \$197.38 per week or \$11,404.62 for a 32 percent loss of use of the right forearm, making a total award of \$15,239.71, which is all due and owing and is ordered paid in one lump sum, less any amounts previously paid.

Unauthorized medical expenses are awarded up to the statutory maximum of \$500 upon proper presentation of a medical statement.

Future medical may be ordered upon proper application to the Director.

Cost of transcripts and record are taxed against the respondent as follows:

Metropolitan Court Reporters, Inc.	\$ 170.25
Richard Kupper & Associates	\$ 339.20
Hostetler & Associates, Inc.	\$1,002.80

IT IS SO ORDERED.

Dated this ____ day of October 1996

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Michael R. Wallace, Shawnee Mission, KS
H. Wayne Powers, Overland Park, KS
Robert H. Foerschler, Administrative Law Judge
Philip S. Harness, Director